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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 996 136

CONSOLIDATED TITLE CORPORATION, a Maryland corporation, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OCTOBER TERM, 1959

No. .....

CONSOLIDATED TITLE CORPORATION, a Maryland corporation, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Title Corporation, a Maryland corporation, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in Nos. 15,120 to 15,138, inclusive, entered February 25, 1960, and on a Petition for Rehearing, the Order denying the same entered April 1, 1960.

CITATIONS TO OPINIONS BELOW

The opinion of the District of Columbia Tax Court is reported at 87 W.L.R. 288; D.C. C.T. 1653, and is printed at page 36 of the Joint Appendix. The opinion of the United States Court of Appeals for the District

of Columbia Circuit is reported at U. S. App. D.C. , 275 F. 2d 885, and is printed at page 5a of the Appendix to this Petition. The order of the United States Circuit Court of Appeals denying the petition for rehearing is reported at U. S. App. D.C. , 275 F. 2d 885, and is printed at page 8a of the Appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered February 25, 1960. Rehearing was denied April 1, 1960 (Appendix, pp. 7a, 8a). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

This case presents the question of the taxability under the District of Columbia Revenue Act of 1939 and the Income and Franchise Tax Act of 1947, as income from District sources, of dividend distributions to Petitioner, a non-resident corporation, found by both Courts below to be not doing business in the District of Columbia. Subsidiary questions grow out of the fact that the Courts below failed to pass upon the effect of a provision of the District of Columbia statute exempting the subsidiary, operating title insurance corporations from the payment of income tax and the ruling that no apportionment was required, although the source of the earnings of the subsidiary, operating title insurance corporations was in substantial part from their operations in Maryland and Virginia. The case presents the further constitutional question under the Fifth Amendment as to whether Petitioner is not deprived of its property without due

process of law in requiring it to pay accumulated taxes, penalties and interest for nineteen years in the course of overruling the only judicial decision as to the scope and meaning of *income from District sources.*

STATUTES INVOLVED

District of Columbia Revenue Act of 1939, approved July 26, 1939, Public Law No. 225, 76th Congress, First Session, Chap. 367 and District of Columbia Income and Franchise Tax Act of 1947, Public Law No. 195, 80th Congress, First Session, Chap. 258 (cited provisions are printed in Appendix hereto).

STATEMENT OF THE CASE

Petitioner was organized in 1934, under the laws of the State of Maryland as an instrumentality in carrying out a plan of reorganization of Washington Consolidated Title Company in and approved by the Bankruptcy Court in Baltimore, Maryland. The bankrupt corporation owned more than 75 percent of the capital stock of each of three title insurance companies which operated in the District of Columbia, Maryland and Virginia. Under the provisions of its corporate charter, Petitioner was under the control of a Committee of Creditors who were given all of the controlling Class A stock. The Committee managed Petitioner until its bonds were paid off in 1945.

Respondent has asserted against Petitioner taxes for the years 1939 through 1957 under the Revenue Act of 1939 and the Income and Franchise Tax Act of 1947. The sole source of Petitioner's income was dividends received from the three operating title insurance companies which did business in Virginia and Maryland, as well as the District of Columbia. The Tax Court found that Petitioner was not engaged in commercial

activity or in any trade or business in the District of Columbia (JA 49), and the Court below did not change that finding.

Notwithstanding its holding that Petitioner was a non-resident corporation and was not doing business in the District of Columbia, the Tax Court held that the dividends paid by the three operating title insurance companies during all the years involved constituted taxable income to the Petitioner in each of said years. The basis of the Tax Court decision, which was affirmed by the Court below, was that these dividends were taxable as income from District of Columbia sources.

In connection with the business of the three operating title insurance companies, Petitioner offered to prove that they search title, issue title certificates and insurance policies in the District of Columbia, in several counties in Maryland, and in several counties and cities in Virginia; that as a result, these three companies have had income from sources outside of the District of Columbia; that the income from such sources is substantial; and that such sources of income go into the general funds of the three title insurance companies and "as far as Consolidated is concerned, come out in the form of a dividend" or become "a base for the payment of a dividend" to Petitioner. The Court sustained objections to this line of testimony and appropriate tenders were made (JA 79, 80). The Tax Court held that this income was not subject to apportionment because the Commissioners had adopted no formula for apportionment in these circumstances and therefore all of said dividend income must be "*allocated* in its entirety to the District of Columbia." (JA 52).

The three operating title insurance companies paid to the District of Columbia a tax equal to two (2%) percent of their net premium receipts under the provisions of Title 47, Section 1806 of the D. C. Code (1951) (JA 81, 82). By the terms of this statute,[1] this tax is "in lieu of all other taxes" and these companies are not required to pay income and franchise taxes to the District of Columbia. For the nineteen-year period 1939 to 1957, taxes paid by these operating title insurance companies to the District of Columbia aggregated $129,664.49, or a yearly average of over $6,800 (JA 83). Petitioner contends that the exemption granted these operating title insurance companies by reason of payment of the net premium receipt tax prevented the District of Columbia from taxing their distributions to Petitioner as dividends subject to income or income and franchise tax.

The total amount of taxes, penalties and interest assessed against and paid by Petitioner for the nineteen years was $206,112.56 (JA 62). The taxes are imposed not only for the more recent years but also for the six years in which Petitioner was under the control of the Committee of Creditors growing out of the bankruptcy proceeding in Baltimore.

[1] The Court of Appeals held in *Real Estate Title Insurance Company v. District of Columbia*, 82 U.S. App. D.C. 170, 161 F. 2d 887, that Section 1806 and not Section 1702 applies to title insurance companies.

REASONS FOR GRANTING THIS WRIT

The decision below is not in accord with applicable decisions of this Court as to the taxation of non-resident corporations, not engaged in business in the jurisdiction, and as to the lack of power to tax earnings attributable to other jurisdictions without apportionment. The case also presents an important question not hitherto decided by this Court, as to the constitutional limitation of judicial power in overruling the settled construction of a tax statute, with resulting imposition of taxes, penalties and interest for nineteen years.

The primary question in this case relates to the statutory construction of the following provision of the Income and Franchise Tax Act of 1947 relating to taxation of corporations:

TITLE X.

"§ 47-1580. *Purpose of article.*

> "It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District:"

In numerous cases the District of Columbia Courts have construed this Act as imposing an income tax on individuals and a franchise tax on corporations, e.g. *District of Columbia* v. *Southern Railway Company*, ___ U.S. App. D.C. ___, ___ F. 2d ___, decided on the same day, February 25, 1960; *Smoot Sand & Gravel Corp.* v. *District of Columbia*, 104 U.S. App. D.C. 292, 261 F. 2d 758; *District of Columbia* v. *Radio Corporation of America*, 98 U. S. App. D.C. 119, 120, 232 F. 2d 376. Petitioner contended that it was a non-resident corporation, not engaged in business in the

District of Columbia, and therefore it was not subject to the tax. The Tax Court found as a fact that Petitioner was not engaged in business or in commercial activity in the District of Columbia and the Court of Appeals did not disturb that finding. Both Courts held that Petitioner was subject to tax because the dividends constituted income from District sources and were therefore taxable, even though Petitioner was not doing business therein. In so holding, the Courts below have ruled contrary to numerous decisions of this Court that the doing of business or engaging in commercial activity is the legal basis and prerequisite for a franchise tax. *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, 55 L. ed. 458; *McCoach* v. *Minehill*, 228 U. S. 295, 57 L. ed. 842, 847; *United States* v. *Emily Bird Thayer Real Estate Company*, 227 U.S. 28, 59 L. ed. 825.

The same statute imposes an unincorporated business tax upon individuals engaged in business activity which is capable of being performed as a corporation. This tax is imposed upon both residents and non-residents. Based primarily upon the analogy of the tax to that imposed upon corporations, the Court of Appeals held in *District of Columbia* v. *Pickford*, 86 U.S. App. D.C. 17, 179 F. 2d 271, that only the income attributable to business activity was subject to the tax. In its decision therein the Court cited and relied upon the above-mentioned decisions of this Court.

The effect of this construction is to give this general language of the statute the broadest application which would include within its ambit all income that the Congress could constitutionally tax for the benefit of the District of Columbia. Under this construction, the denomination of the tax as a *franchise tax* is mislead-

ing and confusing because by definition and use, a franchise tax is one that is imposed upon the privilege of doing business; here the tax is imposed even though it was found as a fact that Petitioner was not doing business or engaged in commercial activity in the District of Columbia. Furthermore, the entire first clause becomes meaningless because in this case Petitioner has not enjoyed the privilege of doing business in the District of Columbia but is nevertheless held to be subject to the tax. In the only comparable State decision that has been found, the Court of Appeals of Kentucky held that the principle of *ejusdem generis* required that the word "*sources*" be construed narrowly, in relation to the business done in that State, and that the statutory imposition of the tax upon income from sources in Kentucky, did not make taxable dividends paid by corporations operating in Kentucky to their non-resident parent corporation. *Atlantic Coast Line R. Co. v. Commonwealth*, 302 Ky. 36, 193 S.W. 2d 749, 758. Compare also *Williams v. American Refrigerator Transit Co.*, 91 Ga. App. 522, S.E. 2d 336.

This Court has held that the constitutional incidence of a tax on dividends is the earnings and profits of the distributing corporation. *Brainard v. Hubbard*, 12 Wall. 1, 10; 20 L. ed. 272, 275. In *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 446, 85 L. ed. 267, 271, this Court held that a tax on non-residents on account of Wisconsin's allocated portion of earnings distributed as dividends, could be sustained as an additional income tax applicable at the time of distribution. See also *International Harvester Co. v. Wisconsin*, 322 U. S. 435, 443, 88 L. ed. 1373, 1380.

In the present case both Courts below refused to consider the fact that the sources of a substantial

portion of these dividends were the business activities of the operating title insurance companies in the States of Maryland and Virginia. Since the essential nature of a tax on dividends is a deferred tax upon the income of the distributing corporation, this income necessarily was partly from sources outside of the District of Columbia and therefore not subject to tax. The statute under consideration provides for apportionment where the income is in part from sources outside the District (D. C. Code 47-1580a). In *Panitz* v. *District of Columbia*, 74 App. D. C. 284, 122 F. 2d 61, it was held that the constitutionality of a District of Columbia franchise tax on a non-resident corporation could be sustained only when the tax was reasonably related to the income attributable to the District of Columbia. Compare *District of Columbia* v. *Evening Star Newspaper Co.*, 106 U. S. App. D.C. 360, 273 F. 2d 95, decided December 10, 1959.

The decision in this case is not in accord with the decision of this Court in *Hans Rees' Sons* v. *N. Carolina ex rel Maxwell* (1931), 283 U. S. 123, 138, 75 L. ed. 879, 905. There, this Court was asked to determine the validity of an apportionment provision applied by the State of North Carolina with respect to a corporate taxpayer doing business in another state. Evidence was offered to show that the apportionment formula was arbitrary and unconstitutional, because no allocation was made with respect to out-of-state earnings. The Supreme Court of North Carolina had held that the taxpayer constituted a unitary business and for this reason no apportionment need be made. This Court reversed that decision, holding that the refusal to consider the tendered evidence as to the out-of-state earnings constituted prejudicial error and a denial of the taxpayer's constitutional right to due process.

The facts in the present case amount to a complete parallel of those considered in the above-cited decision of this Court.

Dividend distributions of corporations operating in the District of Columbia are not usually taxable when received by another corporation because the statute exempts from taxation distributions made by a corporation which is subject to said Act. The purported exception in this instance arises from the fact that the title insurance corporations pay a tax under the provisions of Title 47-1806 of the District of Columbia Code, instead of a strict income tax. However, this statute provides that the tax paid by these title insurance companies "shall be in lieu of all other taxes". The Courts below refused to give any weight or consideration to this provision. It is submitted that since under the doctrine of *Wisconsin* v. *Penney*, *supra*, a tax on dividends is a deferred tax on the income of the corporation, this statutory exemption from other taxes should have the effect of preventing the distributions of said corporations out of their earnings and profits from being taxed as dividends. Moreover, such an interpretation would be in harmony with the general provisions of the statute which are to tax the earnings of corporations only once and not to tax dividends distributed to other corporations.

The term *income from District sources* was used in both the 1939 and the 1947 Acts. The only known judicial construction of the term was made by the Board of Tax Appeals of the District of Columbia in *Community Finance Corporation* v. *District of Columbia*, 72 W.L.R. 737, decided July 13, 1944. The Board of Tax Appeals gave thorough consideration to the problem and drew a parallel with the provisions

of the 1939 Internal Revenue Code, which had been enacted only shortly before the District law. While the provisions of the Code were specific as to what constituted income from sources within the United States, the language of the District of Columbia statute was only general in nature. Specifically the Board held that payments of interest by residents of the District to a Virginia corporation, not doing business in the District, did not constitute income from District sources that was taxable to the corporation. The case was presented as a test case but was not appealed. The decision of the Board was in line with the District of Columbia statutes and decisions which do not tax non-residents or residents domiciled elsewhere.

The present decision denotes a change of tremendous importance. It is based upon the broadest possible construction of the statute. It is fundamentally contrary to the concept of a franchise tax. The principle underlying the decision would be equally applicable to dividends paid by banks and public utilities, which pay a gross receipts tax in lieu of an income tax. The stock of such corporations as Potomac Electric Power Company is widely held, and the effect of this decision would require a non-resident corporation not only to pay a tax in the District of Columbia on the dividends received, but also under the provisions of Title 47-1546 to take out a license to receive such income from District sources. It is submitted that this construction of the statute is fundamentally unsound and inconsistent with its other provisions, and results in the taking of Petitioner's property without due process of law, in violation of the Fifth Amendment of the Constitution. If such a statute and construction should be adopted by other states, it would have the

effect of preventing investment in the securities of District of Columbia public utilities and banks by non-resident corporations.

With respect to Petitioner, this drastic change in judicial construction results in the imposition of taxes, interest and penalties accumulated over nineteen years. Such accumulated taxes, imposed all at one time, constitute an unconscionable and unbearable burden. Certainly the constitutional requirements of due process place some reasonable limitation and restriction upon retroactive judicial construction, in the same way that the constitutional limitations apply to retroactive legislation. *Welch* v. *Henry*, 305 U. S. 134, 150, 83 L. ed. 87, 95.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition should be granted.

Respectfully submitted.

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June 10, 1960

APPENDIX

STATUTES INVOLVED

TITLE X.

"§ 47-1580. *Purpose of article.*

"It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: *Provided, however*, That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this article shall not be considered as income from sources within the District for the purposes of this article: The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District: *Provided further*, That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in sections 47-1551 to 47-1551c shall not be considered as income from sources within the District for purposes of this article, with the exception of income from sales to the United States not excluded from gross income as provided in section 47-1557a (b) (13). (July 16, 1947, 61 Stat. 349, ch. 258, Art. I, Title X, § 1; May 3, 1948, 62 Stat. 207, ch. 246, § 2.)"

"§ 47-1580a. *Allocation and apportionment.*

"The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall, along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article. (July 16, 1947, 61 Stat. 349, ch. 258, Art. I, Title X, § 2.)"

"§ 47-1806. *Rates on insurance companies—Exceptions—Definitions—Marine insurance excluded.*

"All such companies, including companies which issue annuity contracts, shall also pay to the collector of taxes of the District of Columbia a sum of money as taxes equal to 2 per centum of their policy and membership fees and net premium receipts or consideration received on all insurance and annuity contracts on risks in the District of Columbia, said taxes to be paid before the 1st day of March of each year on the amount of such income for the year ending December 31, next preceding. Such tax shall be in lieu of all other taxes except (1) taxes upon real

estate and (2) fees and charges provided for by the insurance laws of the District including amendments made to such laws by this title.

"Net premium receipts or consideration received means gross premiums or consideration received less the sum of the following:

"1. Premiums received for reinsurance assumed and premiums or considerations returned on policies or contracts canceled or not taken.

"2. Dividends paid in cash or used by the policyholders in payment of renewal premiums.

"Nothing contained in this section or in sections 47-1801, 47-1807 shall apply with respect to marine insurance written within the said District and reported, taxed, and licensed under the provisions of sections 35-110, to 35-1132. (Aug. 17, 1937, 50 Stat. 676, ch. 690, Title II, § 6; May 16, 1938, 52 Stat. 358, ch. 223, § 2.)"

"§ 47-1546. *Licenses—Corporations liable—Duration—Posting—Revocation—Renewal—Penalties—'Business' defined.*

"(a) Every corporation (except those expressly exempt from the tax imposed by this title) engaging in or carrying on any business, or receiving income from District of Columbia sources, shall obtain a license so to do on or before the 1st day of January of each year: * * *.

* * *

"(d) Every corporation not having an office or place of business in the District but which receives income from District sources or engages in or carries on any business in the District by or through an employee or agent shall procure the license provided by this title. * * * No employee or agent of a corporation not having an office or place of business within the District shall engage in or carry on any business in the District for or on behalf of

such corporation unless such corporation shall have first obtained a license, as provided by this title.

* * *

"(g) Any corporation receiving income from District sources or engaging in or carrying on any business in the District without first having obtained a license so to do, and any person engaging in or carrying on any business for or receiving income from District sources on behalf of a corporation not having a license so to do, shall, upon conviction thereof, be fined not more than $300 for each and every failure, refusal, or violation, and each and every day that such failure, refusal, or violation continues shall constitute a separate and distinct offense. * * *

"(h) The term 'business' as used in this section, shall include the carrying on or exercising for gain or economic benefit, either direct or indirect, any trade, business, or commercial activity in the District: * * *" (July 26, 1939, ch. 367, Title II, § 43, as added Feb. 2, 1942, 56 Stat. 45, ch. 33, § 1(q), amended June 22, 1942, 56 Stat. 376, ch. 433, §§ 2, 3.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15120-15138

CONSOLIDATED TITLE CORPORATION, a Maryland corporation, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

Petitions for Review of Decisions of the District of Columbia Tax Court

Decided February 25, 1960

Mr. John J. Wilson, with whom Messrs. Philip S. Peyser and Thomas S. Jackson were on the brief, for petitioner.

Mr. Henry E. Wixon, Assistant Corporation Counsel for the District of Columbia, with whom Messrs. Chester H. Gray, Corporation Counsel, and Milton D. Korman, Principal Assistant Corporation Counsel, were on the brief, for respondent. Mr. Leo J. Ehrig, Assistant Corporation Counsel, also entered an appearance for respondent.

Before EDGERTON, BAZELON, and FAHY, *Circuit Judges*.

EDGERTON, Circuit Judge: Petitioner, Consolidated Title Corporation, asks review of decisions of the District of Columbia Tax Court affirming assessments of income taxes for the years 1939 to 1946, and of franchise taxes for the years 1947 to 1959.

Petitioner is a corporation organized under the laws of Maryland. It has a statutory corporate office in Baltimore, but its books and records are kept, meetings of stockholders and directors are held, and the corporate business is transacted in the District of Columbia. It was organized to carry out a court-approved reorganization of a bankrupt corporation. Its entire income consists of dividends from three subsidiary corporations, all of which are organized under District of Columbia law, have

their principal offices and businesses in the District and are engaged in the real estate title examination and insurance business.

The District of Columbia Income Tax Act of 1939 imposed a 5% tax on the income of every corporation, whether domestic or foreign, "from sources within the District of Columbia." D.C.Code (1940 Ed.) §§ 47-1502(b), 1504(b). The District of Columbia Income and Franchise Tax Act of 1947 imposed a 5% tax on the income of every corporation, whether domestic or foreign, for "the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District." D.C.Code (1951 Ed.) § 47-1571a. Congress declared its purpose "to impose . . . a franchise tax upon every corporation . . . for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District . . . ." D.C.Code (1951 Ed.) § 47-1580.

The Tax Court held, and we agree, that petitioner received its income from "sources within the District" and was therefore subject to these taxes. The "sources" were petitioner's subsidiary corporations. Since they had their principal offices and businesses in the District, they were "within the District"; they were "'domiciled' therein, corporately and commercially", as the Tax Court found. It is immaterial that some of their business was done elsewhere. We are not concerned with the sources of *their* income, but only with the sources of petitioner's income. *Cf. Eastman Kodak Co.* v. *District of Columbia*, 76 U.S. App.D.C. 339, 340, 131 F.2d 347, 348. We need not consider whether petitioner was "engaging in . . . business within the District" within the meaning of the franchise tax. *Cf. District of Columbia* v. *Virginia Hotel Co.*, 92 U.S.App.D.C. 186, 187, 204 F.2d 390, 391.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 15,120 through 15,138

September Term, 1959

Docket Nos. 1642 through 1660

CONSOLIDATED TITLE CORPORATION, a Maryland corporation,
Petitioner,

v.

DISTRICT OF COLUMBIA, *Respondent.*

Petitions for Review of Decisions of the District of Columbia Tax Court.

Before: Edgerton, Bazelon and Fahy, Circuit Judges.

Judgment

These cases came on to be heard on the record from the District of Columbia Tax Court, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the decisions of the said Tax Court on review in these cases are affirmed, with costs.

PER CIRCUIT JUDGE EDGERTON.

Dated: February 25, 1960.

United States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 25 1960

Joseph W. Stewart
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,120-15,138

September Term, 1959

CONSOLIDATED TITLE CORPORATION, a Maryland corporation, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

Order

[ON PETITION FOR REHEARING]

There not being a majority of the Circuit Judges of this court in favor of a rehearing of the above entitled case by the court in banc, the petition for rehearing in banc is hereby denied.

For the Court:

Chief Judge

Dated: April 1, 1960

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Office Supreme Court, U.S.
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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1960

No. [redacted] 136

CONSOLIDATED TITLE CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 996

CONSOLIDATED TITLE CORPORATION, *Petitioner*,

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BRIEF FOR RESPONDENT IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Although petitioner states in its petition that it relies upon the Fifth Amendment to the Constitution, and although it refers to the District of Columbia Revenue Act of 1939 (Act of July 26, 1939, 53 Stat. 1087, ch. 367) as one of the statutes involved, it has not included in its petition either the text of the Fifth Amendment or pertinent pro-

visions of the District of Columbia Revenue Act of 1939. Notwithstanding it does not believe the Fifth Amendment to the Constitution is applicable in this case, respondent has, for the convenience of the Court, included in the appendix to its brief the text of the amendment, together with pertinent provisions of the District of Columbia Revenue Act of 1939 and, additionally, pertinent provisions of the District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 328, ch. 258, as amended.

QUESTIONS PRESENTED

In the view of respondent, the questions presented are:

1. Where, for the years 1939 to 1946 inclusive, the District of Columbia Revenue Act of 1939 imposed a tax upon the income from District of Columbia sources of every corporation, whether domestic or foreign, except those corporations expressly exempt from tax (and petitioner is not so exempt), was not the United States Court of Appeals for the District of Columbia Circuit correct in holding that petitioner, as a corporation having its commercial domicile and residence within the District, was liable under said Act to a tax upon income in the form of dividends having their sources within the District and received by petitioner from subsidiary corporations controlled by it within the District.

2. Where the District of Columbia Income and Franchise Tax Act of 1947 imposes upon corporations a franchise tax for the privilege of carrying on or engaging in "any trade or business" or "commercial activity" within the District and of receiving income from sources within the District, was not the United States Court of Appeals for the District of Columbia correct in holding that petitioner, for the years 1947 to 1957 inclusive, was liable to tax on the income derived by it, a corporation carrying on all of its corporate activities within the District of Columbia, from dividends received by it from subsidiary corporations which petitioner controlled within the District.

COUNTERSTATEMENT OF THE CASE

Petitioner, a corporation, was organized under the laws of Maryland in 1934 pursuant to a plan of reorganization of a corporation known as Washington Consolidated Title Company, which owned all of the capital stock of Lawyers Title Insurance Company, 85 per centum of the capital stock of District Title Insurance Company, and 76 per centum of the stock of Washington Title Insurance Company (R. 12-13).

Lawyers, District and Washington Title Insurance companies were and are District of Columbia corporations with their joint principal office at 1413 Eye Street, N. W., Washington, D. C., where they jointly engage in the business of issuing land title insurance, land title certificates, the making of settlements of transfers of land and other business activities usually conducted by title companies (R. 13).

During all of the taxable years involved, petitioner maintained an office at 1413 Eye Street, N. W., Washington, D. C. at which were kept its books and records including its corporate minute book and where petitioner held all meetings of its directors and officers and to which were referred all persons having business or other matters with petitioner. (R. 12).

Since the latter part of 1956 petitoner has had an office in Silver Spring, Maryland, in premises occupied by its operating subsidiaries. However, no space in those premises was assigned to petitioner; no office or employee of petitioner was located there, petitioner held no meetings of its directors or officers in that office, and none of petitioner's records were kept there. If any person inquired at the Silver Spring office concerning business or any other matter relating to the petitioner such person was directed to take the matter up with an officer of petitioner at its office at 1413 Eye Street, N. W., Washington, D. C. (R. 13).

Petitioner, since the year 1949, has not filed income tax returns with the State of Maryland. Returns filed by peti-

tioner with the State of Maryland from 1941 to 1949, inclusive, do not report or show dividends received by petitioner from its subsidiaries and, further, reported to the State of Maryland that petitioner owed no income taxes to that state. Petitioner has paid an income tax to the State of Maryland only for the years 1937 through 1949 (R. 29). Petitioner never filed with the District of Columbia an income tax or franchise tax return for the calendar years 1939 to 1956, inclusive, nor did petitioner through any officer, attorney, or agent ever inquire of or confer with any officer or agent of the District of Columbia concerning the matter of its liability for income taxes during the years 1939 to 1946, inclusive, or for franchise taxes for the years 1947 through 1956, or concerning its duty to file its returns under the respective taxing acts (R. 30).

On August 7, 1956, the assessing authority of the District sent to petitioner a notice of proposed deficiency assessments of taxes against it under the 1939 Revenue Act and under the Income and Franchise Tax Act of 1947. Subsequently, on July 9, 1958, after considering petitioner's claims that it was not taxable, the District assessed against petitioner under the 1939 Revenue Act deficiencies in income taxes for the years 1939 through 1946, inclusive, and deficiencies in franchise taxes under the Income and Franchise Tax Act of 1947 for the years 1947 through 1955, inclusive, together with penalties and interest. On September 25, 1958, deficiency assessments were made against petitioner for franchise taxes for the years 1956 and 1957. These taxes were paid by petitioner on October 6, 1958. Thereafter, it filed petitions in the District of Columbia Tax Court for a review of the assessments of taxes against it. (R. 32-36.)

The Tax Court, on March 17, 1959, rendered decisions holding that, with the exception of certain interest imposed against petitioner and with the exception of certain modifications resulting from the evidence adduced at trial, the

assessments of taxes, penalties and interest against petitioner were correct and these assessments, as modified, were affirmed (R. 67-76). On appeal to the United State Court of Appeals for the District of Columbia Circuit, that Court affirmed the decisions of the Tax Court (R. 88). On April 1, 1960, the Court of Appeals denied a petition filed by petitioner for a rehearing en banc of these cases. (R. 90).

SUMMARY OF ARGUMENT

Petitioner does not set forth adequate reasons for the granting of its petition for writ of certiorari. Such reasons as it does give do not bring the case within considerations governing review on certiorari encompassed in Rule 19 of the rules of this Court. The decision of the United States Court of Appeals for the District of Columbia Circuit accords with its own prior decisions and with the statutory provisions involved, and, to the extent that they are applicable, accords also with decisions of this Court. No substantial questions are presented by petitioner which call for the exercise by this Court of its jurisdiction to review this case on writ of certiorari.

ARGUMENT

I

The statutes involved in this case are the District of Columbia Revenue Act of 1939 and the District of Columbia Income and Franchise Tax Act of 1947. These statutes are directed solely to the raising of revenues for the administration of the District of Columbia Government; they do not have application outside the District. This Court has stated that, in the absence of extraordinary reason, which this case does not present, it will not review proceedings arising under statutes of such limited applicability. *American Security & Trust Co.* v. *District of Columbia*, 224 U.S. 491, 56 L. Ed. 856, 32 S. Ct. 553; *United Surety Co.* v. *American Fruit Product Co.*, 238 U.S. 140, 59 L. Ed. 1238, 35 S. Ct.

828. In *Del Vecchio* v. *Bowers*, 296 U.S. 280, 80 L. Ed. 229, 56 S. Ct. 190, speaking of a statute confined in its operation to the District of Columbia, this Court said:

> "* * * We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District."

The considerations which, in Rule 19 of its rules, this Court has said shall govern review on certiorari do not contemplate the granting of a petition for certiorari where, as the record herein shows, the United States Court of Appeals for the District of Columbia Circuit has clearly rendered its judgment in accordance with local law.

II

Section 2(b) of the District of Columbia Revenue Act of 1939 imposed a tax for each taxable year "upon the taxable income from District of Columbia sources of every corporation, whether domestic or foreign" except certain corporations which the statute denominated as expressly exempt from tax. The District of Columbia Tax Court concluded and the Court of Appeals agreed that the income received by petitioner from its operating subsidiaries constituted income from District of Columbia sources (R. 40-41; 86). As the Court of Appeals said:

> "The Tax Court held, and we agree, that petitioner received its income from 'sources within the District' and was therefore subject to these taxes. The 'sources' were petitioner's subsidiary corporations. Since they had their principal offices and businesses in the District, they were 'within the District'; they were '"domiciled" therein, corporately and commercially', as the Tax Court found. It is immaterial that some of their business was done elsewhere. We are not concerned with

> the sources of their income, but only with the sources of petitioner's income."

It is pertinent to note that in that portion of its petition wherein it sets forth its reasons for the granting of a writ of certiorari petitioner says:

> "The primary question in this case relates to the statutory construction of the following provision of the Income and Franchise Tax Act of 1947 relating to taxation of corporations * * *". (Petition, P. 6).

It would appear that petitioner does not seriously contest its liability to income tax under the Revenue Act of 1939 for, although it refers to that Act, it substantially limits its argument to the District of Columbia Income and Franchise Tax Act of 1947.

III

This Court in *National Insurance Co.* v. *Tidewater Company*, 337 U.S. 582, 93 L. Ed. 1556, 69 S. Ct. 1173, cited with approval the decision of the United States Court of Appeals for the District of Columbia in *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 F. 2d 246. In the *Neild* case, the Court of Appeals, at page 310, 311 of its opinion, said:

> "* * * Subject only to those prohibitions of the Constitution which act directly or by implication upon the Federal government, Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. In fact, when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited powers of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the

> states, on the other. * * * When it acts by virtue of these general legislative powers it is free of the restraints which are imposed by the Constitution upon the States."

In many of its decisions concerning the power of the Congress over the District of Columbia, this court has expressed itself in similar vein. *Parsons* v. *District of Columbia*, 170 U.S. 45, 42 L. Ed. 943, 18 S. Ct. 521; *Wight* v. *Davidson*, 181 U.S. 371, 45 L. Ed. 900, 21 S. Ct. 616; *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 76 L. Ed. 1204, 52 S. Ct. 607; *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 97 L. Ed. 1480, 73 S. Ct. 1007; *Stoutenburg* v. *Hennick*, 129 U.S. 141, 32 L. Ed. 637, 9 S. Ct. 256; *O'Donoghue* v. *United States*, 289 U.S. 516, 77 L. Ed. 1356, 53 S. Ct. 740; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 43 L. Ed. 873, 19 S. Ct. 80.

As the courts of the District of Columbia have held, the District of Columbia Income and Franchise Tax Act of 1947 imposes a tax upon the privilege of engaging in business within the District, as well as upon the receipt of income from District of Columbia sources. To this extent the District's statute is similar in its context and the subject matters of tax to the taxing statutes in force in many of the states. The United States Court of Appeals in 1953 in *Lever Bros.* v. *District of Columbia*, 92 U.S. App. D. C. 147, 204 F. 2d 39, concluded, moreover, that the District of Columbia Income and Franchise Tax Act of 1947 imposes a tax upon income received from District of Columbia sources even though the corporation receiving that income is not "doing business" in the District. That decision accords also with the decision of the Court of Appeals in *District of Columbia* v. *Virginia Hotel Co.*, 92 U.S. App. D. C. 186, 204 F. 2d 390, to which the court's opinion in the instant case referred.

The decisions of this Court and of other courts upon which petitioner relies involved, to a large degree, problems relating to the authority of local taxing jurisdictions to impose taxes upon taxpayers engaged in multistate operations

To the extent that these cases may have defined or limited the authority of the states in taxing matters, they are not applicable to the District since Congress, under its plenary power, is, of course, not subject to the limitations which might be applicable in the case of a state or other local taxing jurisdiction. But, in any event, petitioner in this case was not, as both the Tax Court and the Court of Appeals observed, taxed upon income which resulted from multistate or multijurisdictional operations. *It was taxed upon income derived by it in the District of Columbia from sources confined to the District.* As the Court of Appeals observed in its decision, speaking of the income received by petitioner's subsidiary corporations which in turn was paid to petitioner in the form of dividends:

> "* * * It is immaterial that some of their business was done elsewhere. We are not concerned with the sources of *their* income, but *only with the sources of petitioner's income.*" (Emphasis supplied).

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America, Vol. 1, U. S. Code, pp. XLIV and XLV.

"ARTICLE V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES INVOLVED

District of Columbia Revenue Act of 1939, Act of July 26, 1939, 53 Stat. 1087, ch. 367, as amended by the Act of February 2, 1942, 56 Stat. 42, ch. 33, and by the Act of June 22, 1942, 56 Stat. 376, ch. 433:

Section 2(b) [Sec. 47-1502(b) D. C. Code, 1951, Supp. VIII]:

"Sec. 2(b) *Tax on Corporations.*—There is hereby levied for each taxable year upon the taxable income from District of Columbia sources of every corporation, whether domestic or foreign (except those organizations expressly exempt under paragraph (d) of this section), a tax at the rate of 5 per centum thereof: *Provided, however,* That income derived from the procurement of orders for the sale of personal property by means of telephonic communication, written correspondence, or solicitation by salesmen in the District where such orders require acceptance without the District before becoming binding on the purchaser and seller and title to such property passes from the seller to the purchaser without the District is not from District of Columbia sources: *Provided, further,* That income from the sale of personal property to the United States is not from District of Columbia sources, unless the taxpayer is engaged in business in the District and such property is delivered for use within said District."

Section 4(a) and Section 4(b) [Sec. 47-1504(a) and Sec. 47-1504(b), D.C. Code, 1951, Supp. VIII]:

"Sec. 4(a) *Definition.*—The words 'gross income', as used in this title, include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not immune from taxation under the Constitution, or income derived from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership, or use of, or interest

in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

"(b) *Of Corporations.*—In the case of any corporation, gross income includes only the gross income from sources within the District of Columbia. The proper apportionment and allocation of income with respect to sources of income within and without the District may be determined by processes or formulas of general apportionment under rules and regulations prescribed by the Commissioners."

Section 5(a) (6) [Sec. 47-1505(a) (6) D.C. Code, 1951, Supp. VIII]:

"Sec. 5(a) *Items of Deduction.*—In computing net income there shall be allowed as deductions:

* * * * *

"(6) *Intercompany Dividends.*—In the case of a corporation, the amount received as dividends from a corporation which is subject to taxation under this title."

Section 2(d) (9) [Sec. 47-1502(d) (9) D.C. Code, 1951, Supp. VIII]:

"Sec. 2(d) *Exemptions from Tax.*—The following organizations shall be exempt from taxation under this title:

* * * * *

"(9) Banks, insurance companies, building and loan associations, and companies, incorporated or otherwise, which guarantee the fidelity of any individual or individuals, such as bonding com-

panies, which pay taxes on their gross earnings, premiums, or gross receipts under existing laws of the District of Columbia;"

District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 328, ch. 258, as amended by the Act of May 3, 1948, 62 Stat. 206, ch. 246, and by Title IV, District of Columbia Revenue Act of 1949, 63 Stat. 112, ch. 146, and by Title XII, of the District of Columbia Public Works Act of 1954, 68 Stat. 101, ch. 218:

Section 4(h), Article I, Title I (Sec. 47-1551c(h), D. C. Code, 1951).

"SEC. 4. GENERAL DEFINITIONS.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context—

* * *

"(h) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia; and include the performance of the functions of a public office:[1] *Provided, however*, That the words 'trade or business' shall not include, for the purposes of this article—

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or

[1] As originally enacted in 1947, Sec. 4(h) ended with the words "public office." The proviso to this section was added in its entirety by the Act of May 3, 1948, 62 Stat. 206, ch. 246.

representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article.

"For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such.'

"(n) The word 'dividend' means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: *Provided, however*, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution: *And provided, however*, That the

word 'dividend' shall not include any dividend paid by a mutual life insurance company to its shareholders."

Section 1(g) Article I, Title II (Sec. 47-1554(g), D. C. Code, 1951)

"SEC. 1. The following organizations shall be exempt from taxations under this Article:

* * *

"(g) Banks, trust companies, building and loan associations, insurance companies, companies which guarantee the fidelity of any individual or individuals, such as bonding companies and companies which furnish abstracts of title or which insure titles to real estate, all of which pay taxes on their gross earnings, premiums, or gross receipts under existing laws of the District."

Section 1, Article I, Title III (Sec. 47-1557, D. C. Code, 1951).

"SEC. 1. NET INCOME.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context, the words 'net income' mean the gross income of a taxpayer less the deductions allowed by this article."

Section 2(a), Article I, Title III (Sec. 47-1557a.(a), D. C. Code, 1951).

"SEC. 2. GROSS INCOME AND EXCLUSIONS THEREFROM.—(a) The words 'gross income' include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form

paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings derived from any trade or business or sales or dealings in property whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any sources whatever."

Section 2, Article I, Title V (Sec. 47-1561(a)(c)), Supp. VIII, D. C. Code, 1951).

"Each of the following persons shall file a return with the Assessor stating specifically the items of his gross income and the items claimed as deductions and credits allowed under this article, and such other information for the purpose of carrying out the provisions of this article as the Assessor may require:

"(c) (1) CORPORATIONS.—Every corporation engaging in or carrying on any trade or business within the District or receiving income from sources within the District within the meaning of title X. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or are engaged in or carrying on the trade or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns.

"(2) Affiliated corporations shall file separate returns unless permitted by the Assessor to file consolidated returns."

Section 1 and 2, Article I, Title VII (Sec. 47-1571 and 47-1571a., D. C. Code, 1951).

"SEC. 1. TAXABLE INCOME DEFINED.—For the purposes of this title, and unless otherwise required by the context, the words 'taxable income' mean the amount of net income derived from sources within the District within the meaning of title X of this article."

"SEC. 2. IMPOSITION AND RATE OF TAX. — For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every corporation, whether domestic or foreign (except those expressly exempt under title II of this article).